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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE ROGER T. BENITEZ)

United States of America,

Plaintiff,

v.

Richard Glen Mathews,

Defendant.

Case No. 91cr-0663-BEN-02

**Mr. Mathews's Response to the
Government's Sentencing
Memorandum**

I.

Introduction

Mr. Mathews is set to be re-sentenced on January 23, 2023, following the vacatur of his § 924(c) conviction. The Probation Office has filed an updated Presentence Report, Dkt. No. 169, and the parties have filed their respective sentencing positions. Dkt. Nos. 171, 173.

The PSR and Mr. Mathews both calculate the Sentencing Guidelines at 78-97 months. *See* Dkt. Nos. 169, 173, respectively. In light of those Guidelines, both Probation and Mr. Mathews request that the Court sentence him to the 31-and-a-half years he has already served for his crime. The government's filing, however, contains

1 no Guidelines calculations, and instead asks the Court to sentence Mr. Mathews to
2 495 months – almost 120 months more than the punishment he has already served,
3 and nearly 400 months above the high end of the Guidelines. Mr. Mathews files this
4 short Response to address some of the government’s arguments.

5 II.

6 Response to the Government’s Sentencing Memorandum

7 **A. The government does not oppose Probation’s and Mr. Mathews’s** 8 **calculations of the Guidelines.**

9 The government’s sentencing submission omits any calculation of Mr.
10 Mathews’s Sentencing Guidelines. *See generally* Dkt. No. 171. The government
11 likewise did not object to the Presentence Report’s calculations. It appears therefore
12 to have conceded that the calculations are correct.

13 The government’s failure to even mention the Guidelines, let alone provide
14 the Court with its own calculations, runs afoul of the Supreme Court’s repeated
15 admonishments about the importance of the Guidelines at sentencing. While no
16 longer binding on district courts, the Guidelines “are to be the sentencing court’s
17 ‘starting framework for sentencing’ and ‘anchor . . . the district court’s discretion.’”
18 *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016) (quoting *Peugh v. United*
19 *States*, 569 U.S. 530, 549 (2013)). Indeed, “the Guidelines are not only the starting
20 point . . . but the lodestar” for sentencing, *id.* at 200, and this Court is required by
21 statute to take them into account for its sentencing decision. 18 U.S.C. §
22 3553(a)(5)(A).

23 As reflected in the Presentence Report, the Guideline range for Mr. Mathews’s
24 crime is 78-97 months. *See* Dkt. No. 169. While the Court is not bound by that range,
25 the range is both the “starting point” and the “lodestar” that “anchors [this] Court’s
26 discretion.” Accordingly, the Court should adopt that Guideline range as its starting
27 point, notwithstanding the government’s failure to mention it.
28

1 **B. The government’s filing repeatedly misstates the record: Mr. Mathews**
2 **did *not* cause James Wilson’s death.**

3 James Wilson was grievously injured by the bomb that Mr. Mathews conspired
4 to plant at James Rivera’s house: he suffered fractured bones in his arms and legs,
5 lost his right pinky finger, and was rendered partially blind and deaf. *See* 1993 PSR at
6 3. These are serious and painful injuries that undoubtedly caused Mr. Wilson much
7 suffering. But the bomb did *not* cause his death seven months later from an unrelated
8 illness, and the government flatly misstates the record when it repeatedly claims the
9 contrary.

10 The 1993 Presentence Report quotes directly from Mr. Wilson’s autopsy
11 report:

12 In May, 1991, he (James Lee Wilson) suffered injuries from a
13 bomb blast. He sustained several fractures of his extremities and
14 lost the right fifth finger. Injuries to the rest of his body were
15 superficial, although he was partially blind and deaf. He,
16 however, recovered well. At the time of autopsy there was no
17 evidence that his death was related to the bomb injuries.

18 Therefore, the manner of death is considered natural.

19 1993 PSR at 3 (quoting autopsy report). The PSR also reported that Mr. Wilson had
20 been diagnosed as suffering from a terminal illness before his death in December of
21 1991, seven months after he was injured. *Id.* at 13. It was this illness, not the bomb
22 blast, that caused his “natural” death.

23 Despite many opportunities to do so, the government has never once objected
24 to this factual finding of the Presentence Report – not in 1993, not in 1995, not in
25 1997, and not again in 2022. Its only objection in 1993 was to the cross-reference to
26 Chapter 2A—Probation had recommended the Guideline for aggravated assault
27 under § 2A2.2, but the government argued that the Guideline for “attempted
28 murder” under § 2A2.1 should apply instead. *See* First Addendum to the PSR (April

1 7, 1993).¹ Notably, the government did *not* seek to cross-reference the Guideline for
2 manslaughter (§ 2A1.3), second-degree murder (§ 2A1.2), or first-degree murder (§
3 2A1.1), which it surely would have done had the bomb in fact caused Mr. Wilson’s
4 death. The government asked only for the “attempted murder” Guideline, *id.*,
5 indicating that it believed there had been no actual murder at all – and the death of
6 Mr. Wilson, had it been caused by the bomb, would plainly have been felony murder.

7 Notwithstanding its earlier failure to object to the facts in the Presentence
8 Report, or its earlier recommendation of Guidelines consistent with an inchoate
9 crime resulting in injury but not death, the government repeatedly claims that Mr.
10 Mathews “caused” Mr. Wilson’s death. *See, e.g.*, Gov. Sent. Mem. at 1 (claiming Mr.
11 Wilson “later died of from his injuries”); 6 (the bomb “eventually killed an innocent
12 bystander”); *id.* (“Mathews has killed at least three people”); 7 (bomb “maimed and
13 killed an innocent victim”); *id.* (crime “resulted in the death of another human
14 being”). These claims seem to ground in the statements of Mr. Wilson’s family
15 members that he died in December of 1991, two weeks after learning that his partial
16 deafness and blindness would be permanent. *See id.* at 7; *see also* 1993 PSR at 5. But
17 while the beliefs of the family members that the injuries hastened his death are
18 natural, understandable, and sympathetic, they are contradicted by the autopsy,
19 which reports that Mr. Wilson had “recovered well” from the injuries and that the
20 cause of death was “natural.” *Id.* at 3.

21
22
23 ¹ At the initial sentencing, the district court sustained the government’s objection and
24 applied the cross-reference for attempted murder at § 2A2.1. The Ninth Circuit
25 reversed this finding on appeal, and remanded for the district court to resentence Mr.
26 Mathews using a different cross-reference. *United States v. Mathews (I)*, 36 F.3d 821,
27 823 (9th Cir. 1994). The Ninth Circuit’s stray dictum that Mr. Wilson’s death had
28 been “accelerated” by the trauma from his injuries has no factual basis in the record.
As the Ninth Circuit later twice recognized, Mr. Wilson “was severely *injured* when
[the bomb] exploded.” *United States v. Mathews (II)*, 120 F.3d 185, 186 (9th Cir. 1997)
(emphasis added); *see also United States v. Mathews (III)*, 37 F.4th 622, 626 (9th Cir.
2022) (victim was “seriously *injured* by the detonation”) (emphasis added).

1 The government has never before claimed that Mr. Wilson’s injuries “caused”
2 his natural death seven months later, and it has never sought (and still today does not
3 seek) the imposition of any Guideline that would reflect such causation. The Court
4 should not be led astray by the unsupported and charged language in the
5 government’s sentencing memo: Mr. Wilson’s injuries, while severe and tragic, did
6 not cause his death. He died of an illness, not a bomb.

7 **C. The government’s argument for a sentence nearly 400 months over the**
8 **high end of the Guidelines range, and nearly 120 months over the 31-**
9 **and-a-half years he has served, is unreasonable.**

10 After Mr. Mathews’s initial sentence was vacated on appeal due to an incorrect
11 Guideline cross-reference (to attempted murder instead of the correct aggravated
12 assault)², the district court resentenced him in 1995. On this occasion, the district
13 court correctly applied the Guideline for aggravated assault, resulting in a Guidelines
14 range of 78-97 months, the same as Mr. Mathews faces now. But the Court then
15 chose to impose an upward departure of four levels in order to account for the
16 seriousness of the crime – specifically, the seriousness of the risk of injury or death
17 to the two occupants of the home. *Mathews (II)*, 120 F.3d at 187. With a resulting
18 Guideline range of 121-151 months, the district court opted to sentence Mr.
19 Mathews to the high end of 151 months on the same charges for which he now faces
20 resentencing.

21
22 ² In its sentencing memo, the government misstates the basis of the Ninth Circuit’s
23 reversal of the sentence. It claims that “the Ninth Circuit reversed the original
24 sentencing judge for applying the (then mandatory) guidelines for first-degree
25 murder.” Gov. Sent. Mem. at 6. But the Guideline the district court erroneously
26 imposed wasn’t for first-degree murder under § 2A1.1, it was for *attempted* murder
27 under § 2A2.1. *See Mathews (I)*, 36 F.3d at 823-824 (record demonstrates that
28 “Mathews was reckless in creating a danger to human life” but not, “by even a
preponderance of the evidence,” that he had the intent to commit murder). The
difference matters: as the PSR recognizes, and as the government has recognized
through its failure to object to the PSR, the correct Guideline is § 2A2.2(b)(1) for
aggravated assault. Fifth Addendum to PSR at 3.

1 On appeal, the Ninth Circuit again vacated the sentence. This time, the Court
2 of Appeals ruled that, while the district court had had the legal authority to impose
3 such an upward departure, it had abused its discretion and imposed an unreasonable
4 sentence by departing upward by four levels instead of by a lesser amount. *Id.* at 189.
5 The court noted that, by “adding four levels . . . [the district court] gave Mathews an
6 offense level equivalent to what he would have received had he committed two
7 additional offenses of equal or nearly equal seriousness as the bombing offense, plus
8 one of somewhat lesser seriousness.” *Id.* The court noted that “a four-level
9 adjustment at elevated offense levels can have a dramatic effect on the length of the
10 sentence quite disproportionate to what the sentence would have been for the
11 analogous offense standing alone.” *Id.* Accordingly, the court wrote, “[w]e therefore
12 hold the extent of the departure unreasonable and remand for resentencing.” *Id.*

13 This guidance from the Court of Appeals demonstrates that the government’s
14 recommendation of a 400-month upward variance to account for what it describes as
15 the seriousness of the offense is greatly excessive. The factors the government points
16 to – Mr. Wilson’s significant injuries, the risk to others from the bomb, Mr.
17 Mathews’s criminal history, the need to protect the public, and the need for just
18 punishment – are adequately captured by both the Guidelines and the 31-plus years
19 in custody he has already served.

20 For example, the government cites Mr. Wilson’s severe injuries as one basis
21 for the nearly-400-month upward variance, arguing that the “base offense level 14”
22 does not adequately capture the severity of those injuries. Gov. Sent. Mem at 6. But
23 the base offense level is 15, not 14, *see* Fifth PSR Addendum at 3, and Mr. Wilson’s
24 severe injuries *are* captured by the Guidelines – Mr. Mathews receives the maximum
25 *nine-level* upward enhancement for the combination of his planning and the
26 “permanent or life-threatening bodily injury” to Mr. Wilson. *Id.* (citing U.S.S.G. §
27 2A2.2(b)(3)(C) (1990 ed.)); *see also* Def. Sent. Mem., Dkt. No. 173, at 9 (agreeing with
28 USPO calculations). Along with the two-level enhancement for using a weapon,

1 these enhancements together bring the adjusted offense level to 26 – far above the
2 government’s mistaken reference to level 14.

3 The government’s remaining arguments consist of a paragraph each on Mr.
4 Mathews’s admittedly serious criminal record, the need to protect the public, and just
5 punishment. Gov. Sent. Mem. at 6-7. But these short and conclusory arguments
6 offer no reason why these serious and weighty sentencing factors have not been
7 served by the 31-and-a-half years of punishment, incapacitation, and deterrence that
8 Mr. Mathews has already endured as his payment to society for his crime. The
9 government does not, and cannot, justify why these factors require an additional
10 nearly 120 months in custody over the time he has already served, much less why
11 they should justify nearly an extraordinary, nearly 400-month upward variance over
12 the high end of the properly-calculated Guidelines.

13 By ignoring the Guidelines completely, and by repeatedly misstating the
14 record in order to make Mr. Mathews’s admittedly very serious crime appear even
15 worse than it was, the government has untethered its sentencing recommendation
16 from the careful and sober framework for sentencing established by the Supreme
17 Court and the Ninth Circuit. This Court should carefully consider the Guidelines
18 range, the facts of the case, and the remaining § 3553(a) factors, and fashion a
19 sentence that appropriately balances the aggravated nature of the crime and Mr.
20 Mathews’s record before 1991 against the very real punishment, deterrence,
21 incapacitation, and rehabilitation represented by his past three decades in custody.
22 He respectfully asks the Court to find that thirty-one-plus years in custody is a
23 weighty, significant, and appropriate punishment for his serious crime.

24 Respectfully submitted,

25 Dated: January 23, 2023

s/ Benjamin P. Davis

Benjamin P. Davis

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